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Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 331.

ADAMS EXPRESS COMPANY, *Plaintiff in Error*,

vs.

THE COMMONWEALTH OF KENTUCKY.

In Error to the Court of Appeals of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

THE BARCLAY PRINTING CO., Strobridge Building, 108-118 W. Canal St., Cincinnati, O.

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STATEMENT OF THE CASE.

The Adams Express Company, plaintiff in error was indicted in the circuit court of Laurel county, Kentucky, for an offense under subsection 4 of section 2557B. Kentucky Statutes, 1903, commonly called the "C. O. D." law, which is part of the general local option law as amended in 1902, and provides:

"All the shipments of spirituous, vinous or malt liquors, to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town or precinct where such act is in force, shall be unlawful, and shall be deemed sales of such liquors at the place where the money is paid or the

goods delivered; the carrier and his agent selling or delivering such goods, shall be liable jointly with the vendor thereof."

The opinion of the Court of Appeals of Kentucky, says:

"The offense of which appellant was convicted is the one denounced by the foregoing section." R. 29.

The indictment charged that the offense was committed in manner and form as follows:

"The said Joe Newland and the Adams Express Company, the latter being a partnership engaged in and carrying on the business of a common carrier of packages, goods, wares and merchandise, by the method known as express * * * did in Laurel county, Kentucky, on the 17th day of February, 1904, unlawfully and wilfully carry for and deliver to George Meece a parcel, package, shipment and quantity of intoxicating, spirituous, vinous and malt liquors * * * to be and which was paid for on delivery at East Bernstadt in said Laurel county, same being at the time a shipment commonly known and called C. O. D. shipments * * * said shipment and delivery being made and done at the time by said Joe Newland and said Adams Express Company in the usual course of business of said Adams Express Company."

The indictment alleged that "the place from which said shipment was made, the name and owner of said liquor and shipment for whom same was carried and delivered as aforesaid are unknown to this Grand Jury." On the trial of the case, under a plea of not guilty by the defendant, it appeared that the liquor had been shipped from Cincinnati, Ohio, (Rec. 18), billed to George Meece at East Bernstadt, by Crigler and Crigler, wholesale liquor dealers doing business in Cincinnati, who had prepaid the express charges thereon to East Bernstadt (Rec. 19); that Newland, the agent of the express company at East Bernstadt had delivered the package to Meece, who paid the agent the sum of $3.85, the purchase price of the whiskey (Rec. 10); that this sum was put in an

envelope by the agent and returned to the shipper in Cincinnati (Rec. 13). All the evidence produced by the commonwealth went to prove that the liquor was received, carried and delivered by the express company in the usual course of its business as a common carrier, as charged in the indictment. Meece testified that he had not ordered the liquor shipped to him (Rec. 11), but there was no evidence that the agent at East Bernstadt or any other agent of the company knew that it had not been ordered. At the close of the evidence for the commonwealth the defendant moved the court to instruct the jury to find the defendant not guilty, which motion was overruled (Rec. 3, 24), whereupon the defendant offered no evidence, but moved the court to give the following instructions (Rec. 3, 4):

"I. The court says to the jury that spirituous, vinous and malt liquors are articles of and subject of commerce same as other articles of merchandise; that the Adams Express Company is a common carrier, and as such common carrier is bound to receive merchandise, including spirituous, vinous or malt liquors tendered it in another state for transportation into this state as articles of commerce and especially where the express charges are paid by the consignor on the delivery of such goods for transportation, and it is required to deliver said articles and packages to the consignee at its destination and it can not discriminate against liquor as commerce or refuse to carry it from one state to another.

II. Therefore the court says to the jury that if they believe from the evidence that the defendant, Adams Express Company, received from Crigler & Crigler, of Cincinnati, Ohio, the package directed to the witness George Meece, in its regular course of business, and that the charges were prepaid by the consignor in the city of Cincinnati, Ohio, to be shipped by express to said witness at East Bernstadt, Kentucky, C. O. D., and that said package was in its regular course of business shipped to East Bernstadt and delivered to the witness

George Meece, by the agent of the defendant at East Bernstadt, Kentucky,that as applied to said shipment the Act and the Acts of the General Assembly of Kentucky, known as the Local Option Law, under which this defendant was indicted, is in conflict with and in contravention of the Interstate Commerce Clause of the Constitution of the United States, and the laws regulating same, and are therefore void, and you will find the defendant not guilty.

III. The court instructs the jury that if they believe from the evidence that the package delivered to the witness, George Meece, was delivered to the Adams Express Company, charges prepaid, in the City of Cincinnati, state of Ohio, in its regular course of business, for shipment to East Bernstadt, Laurel County, Kentucky, collect on delivery, and was there delivered by the said express company to the consignee, George Meece, and the C. O. D. charges thereon collected, and transmitted by the said Express Company or its agent to the consignor at Cincinnati, Ohio, that the jury must find the defendant not guilty, although the package contained whiskey or other intoxicating liquors."

These instructions the court refused to give (Rec. 4), to which ruling defendant excepted, and the court on its own motion instructed the jury as follows (Rec. 5, 24):

"I. Gentlemen of the jury: If you shall believe from the evidence beyond a reasonable doubt, that the defendant, Adams Express Company, is a co-partnership formed of persons whose names and number were unknown to the grand jury that found this indictment, and who lived out of the state of Kentucky, but are doing business in the state of Kentucky and in Laurel County, Kentucky, and under the firm name and style of "Adams Express Company," and that the said Adams Express Company, in this county and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous, or malt liquore, in quantities of less than five gallons, at the time mentioned by the witness, and re-

ceived the pay therefor, and that such company received any pay whatever for its services in that behalf, then you should find the defendant guilty, and fix its punishment at any fine not less than $60.00 nor more than $100.00 in your discretion, according to the proof.

II. The court says to the jury that if they shall believe from the evidence beyond a reasonable doubt, that the agent or agents of the defendant company that accepted, received, transported or delivered the package, mentioned in evidence by the witness Meece, knew or might, by the exercise of such care as persons of ordinary prudence are accustomed to use in the ordinary transactions of life, have known the contents of the package delivered to the witness, then the defendant company is chargeable with such knowledge and should be held to know the contents of such package.

III. If you have a reasonable doubt, from the evidence of the defendant having been proven guilty, you will find it not guilty."

Defendant reserved exceptions to the giving of these instructions, and was found guilty by the jury, which fixed the fine at $60.00 (Rec. 5). Judgment for this amount having been entered (Rec. 6), defendant filed its motion for a new trial which was overruled. On appeal of the case to the court of appeals, the judgment was affirmed (Rec. 27), and subsequently a petition for rehearing was overruled (Rec. 34).

There was no opinion in the trial court. The court of appeals held that the transaction was not interstate commerce (1) because the consignee had not ordered the whiskey from the shipper (which the testimony of the consignee tended to show), and that the defendant knew that it had not been ordered (of which there was no evidence whatever), and (2) because the defendant, at the request of the consignee, held the whiskey at its depot in East Bernstadt, Kentucky, one week after its arrival before delivering it.

ASSIGNMENT OF ERRORS.

The transaction on account of which the plaintiff in error was prosecuted and convicted constituted interstate commerce and was not subject to regulation by the state of Kentucky, and the statute of Kentucky under which it was convicted is, as applied to that transaction, in conflict with the commerce clause of the constitution of the United States.

The trial court erred in refusing to instruct the jury to return a verdict of not guilty (R. 3), in refusing to give each of the three other instructions requested by the defendant (R. 4), and in giving the first instruction given by the court upon its own motion (R. 5).

The court of appeals of Kentucky erred in affirming the judgment of the trial court.

ARGUMENT.

The defendant, being a common carrier engaged in interstate commerce, carried the whiskey from Cincinnati, Ohio, to East Bernstadt, Kentucky, and there delivered it to the consignee in pursuance of a contract made by it with the shipper in Cincinnati. In making and performing that contract of shipment the defendant was engaged in interstate commerce, and the statute of Kentucky which made it an offense is repugnant to the commerce clause of the Constitution of the United States. We are not concerned with the case of an express company which carries whiskey C. O. D. from one state to another, knowing that it has not been ordered by the consignee, for no such issue was submitted to the jury or decided by it, and there was no evidence of the fact. The defendant was indicted and convicted under a statute which makes it an offense for a carrier to carry and deliver a C. O. D. shipment of whiskey, under any circumstances, and whether it has been ordered or not. The following was the charge of the court to the jury. R. 5:

If you shall believe from the evidence beyond a reasonable doubt that the defendant, Adams Express Company, is a co-partnership, formed of persons whose names and number were unknown to the Grand Jury that found this indictment, and who lived out of the State of Kentucky, but are doing business in the State of Kentucky, and in Laurel county, Kentucky, and under the firm name and style of "Adams Express Company," and that the said Adams Express Company, in this county, and within twelve months next before the finding of the indictment herein, knowingly delivered to the witness, George Meece, spirituous, vinous or malt liquors in quantities of less than five gallons, at the time mentioned by the witness, and received the pay therefor, and that said company received any pay whatever for its service in that behalf, then you should find the defendant guilty, and fix its punishment at any fine not less than $60.00 nor more than $100.00 in your discretion, according to proof.

The statute is as follows, subsection 4, section 2557B. Statutes of Kentucky, 1903:

All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called "C. O. D. shipments," into any county, city, town, district or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof.

I.

The Statute makes it an offense to deliver any C. O. D. shipment of liquor, whether ordered by the consignee or not, and its constitutionality must be determined on that basis.

Under the statute it is an offense for a carrier to deliver a C. O. D. shipment of liquor in local option territory, even if it has been contracted for by the consignee at a place where liquor may be sold lawfully. That was the very purpose of

the statute. It was passed to meet the decision of the court of appeals in James vs. Commonwealth, 102 Ky. 108 (1897), where it was held that if whiskey ordered by letter is shipped from one county to another by express C. O. D., the sale takes place in the county in which the whiskey is delivered to the carrier, and is not a violation of a prohibitory liquor law in force in the county to which it is shipped. It is wholly immaterial therefore under the statute whether the liquor has been ordered by the consignee or not, and the court must determine its validity on that basis.

Such was the construction adopted by the trial court which directed the jury to find the defendant guilty if it delivered the interstate shipment and received any pay for its services, and the affirmance of the judgment by the court of appeals necessarily approved that construction, which was in accordance with the plain terms and evident purpose of the statute. It needs no argument to show that such a statute, as applied to interstate shipments, is repugnant to the Constitution of the United States.

The court can not amend the statute so as to limit it to C. O. D. shipments of liquor that have not been contracted for by the consignee. The plaintiff in error has been indicted and convicted under the statute as passed, and if it is repugnant to the Constitution of the United States the conviction is unwarranted and should be reversed.

In Trade Mark Cases, 100 U. S. 82, 98, this court held that Congress had power to legislate with respect to trademarks used in interstate and foreign commerce, but that the statute before the court was void because it was broad enough to cover all commerce and could not by judicial construction be confined in its operation to interstate commerce, so as to save it from being declared unconstitutional. Mr. Justice Harlan said:

"It is not within the judicial province to give to the words

used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

He quoted the words of Chief Justice Waite in United States vs. Reese, 92 U. S. 214:

"The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In James vs. Bowman, 190 U. S. 127, 142, Mr. Justice Brewer said, page 142:

"Courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fix some particular transaction which Congress might have legislated for if it had seen fit."

In Illinois Central Railroad vs. McKendree, 203 U. S. 514, this court, again referring to the cases and re-affirming the principle, held that an order of the Secretary of Agriculture, fixing a quarantine line and restricting the right to transport cattle across such line, which order in terms applied to all cattle transported from the south of the line to parts of the United States north thereof, was invalid as a whole, because it included cattle transported between two points within the state through which the line ran.

To the same effect are:

Allen vs. Louisiana, 103 U. S. 80.
United States vs. Harris, 106 U. S. 629, 641.
Poindexter vs. Greenhow, 114 U. S. 270, 305.
Spraigue vs. Thompson, 118 U. S. 90, 94.

Baldwin vs. Franks, 120 U. S. 678, 685.

Connolly vs. Union Sewer Pipe Co. 184 U. S. 540, 565.

United States vs. Ju Toy, 198 U. S. 253, 262.

The reasons for applying the rule strictly in construing criminal statutes are discussed at length in Wynehamer vs. The People, 13 N. Y. 378, 424, 441.

II.

The plaintiff in error, in making and performing the contract of shipment in good faith and in the regular course of business, was engaged in interstate commerce, whether there was an antecedent contract of purchase and sale between the shipper and the consignee, or not.

The business of transporting merchandise from one state to another, and contracts by a carrier for such transportation are interstate commerce, in and of themselves.

In Hanley vs. Kansas City Southern Railway, 187 U. S. 617, 619, Mr. Justice Holmes, after referring to Gloucester Ferry Co. vs. Pennsylvania, 114 U. S. 196, 203, and Wabash, St. Louis & Pacific Railway Co. vs. Illinois, 118 U. S. 557, said:

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered."

The foregoing language is quoted with approval in Lottery Case, 188 U. S. 321, 352, where it was held that the carriage of lottery tickets by an express company from one state to another is interstate commerce. In delivering the opinion of the court Mr. Justice Harlan said:

"Undoubtedly, the carrying from one state to another by

independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce." 188 U. S. 345.

The rule goes back to Gibbons vs. Ogden, 9 Wheat. 1, where Chief Justice Marshall said:

"The words are: 'Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."

In United States vs. Freight Association, 166 U. S. 290, the court held that the Sherman Anti-Trust Act, passed by Congress under the powers conferred on it by the commerce clause of the constitution, applied to an agreement between interstate railroads fixing rates. Mr. Justice Peckham delivering the opinion of the court overruled the contention that the statute "was intended to reach only those who were engaged in the manufacture or sale of articles of commerce," and said (p. 312):

"It can not be denied that those who are engaged in the transportation of persons or property from one state to another are engaged in interstate commerce, and it would seem to follow that if such persons enter into agreements between themselves in regard to the compensation to be secured from the owners of the articles transported, such agreement would at least relate to the business of commerce, and might more or less restrain it. * * * Railroad companies are instruments of commerce, and their business is commerce itself. State Freight Tax case, 15 Wall. 232, 275; Telegraph Co. vs. Texas, 105 U. S. 460, 464."

Whiskey, as the court has decided, is an article of commerce which carriers engaged in interstate traffic are bound to carry. In Leisy vs. Hardin, 135 U. S. 100, 110, Chief Justice Fuller said:

"Ardent spirits, distilled liquors, ale and beer are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of congress and the decisions of the courts."

III.

The transaction did not cease to be interstate commerce because the plaintiff in error, at the request of the consignee, held the whiskey at East Bernstadt for a week before delivering it.

Although this was one of the principal grounds upon which the court of appeals held that the defendant was not entitled to protection under the federal constitution, it was repudiated by the court in a later case, which is now before this court on writ of error (No. 332), and is to be argued with this case (Adams Express Company vs. Commonwealth, 92 S. W. 932). In the later case the court said (Record in No. 332, p. 22; 92 S. W. 933):

"Nor do we agree with the attorney general in his view of

the effect of the Wilson Bill upon the transaction in hand. As we understand him, he insists that although the shipment be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept overtime in a wareroom, then the transaction ceases to be one of interstate commerce, and becomes one of local commerce. We do not understand the Wilson Bill, as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided in the various cases cited in the briefs of counsel, that where whiskey is purchased in a foreign state, it may be shipped by the seller to the buyer, into a state where the sale of liquor is prohibited by law: that it is interstate commerce unaffected by the local law until delivery to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refused to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the consignee. If the transaction be interstate commerce originally, it continues so until the goods are delivered into the hands of the consignee."

The doctrine announced by the court of appeals of Kentucky in No. 331, and repudiated by it in No. 332, requires no extensive discussion, in view of the decision of this court in Heyman vs. Southern Railway Co. 203 U. S. 270. That was an action by Heyman, a liquor dealer of Augusta, Georgia, to recover damages from the railroad company for failing to deliver two casks of whiskey shipped by him to residents of South Carolina. It appeared that the consignees had sent the price of the whiskey with the orders, which were given with the understanding that if for any cause delivery was not

made to the consignees the purchase price would be refunded. The liquor was taken out of the warehouse of the railroad company at Charleston, by constables asserting their authority under the dispensary law of South Carolina. The Supreme Court of Georgia affirmed a judgment in favor of the railroad company on the ground that the interstate transportation of the goods ended when they were placed in the warehouse, and the carrier was thenceforward liable only as a warehouseman, and that the goods ceased to be under the shelter of the interstate commerce clause of the constitution. In reversing the judgment Mr. Justice White said (p. 276):

"As the general principle is that goods moving in interstate commerce cease to be such commerce only after delivery and sale in the original package, and as the settled rule is that the Wilson law was not an abdication of the power of Congress to regulate interstate commerce, since that law simply affects an incident of such commerce by allowing the state power to attach after delivery and before sale, we are not concerned with whether, under the law of any particular state, the liability of a railroad company as carrier ceases and becomes that of a warehouseman on the goods reaching their ultimate destination before notice and before the expiration of a reasonable time for the consignee to receive the goods from the carrier. For, whatever may be the divergent legal rules in the several states concerning the precise time when the liability of a carrier as such in respect to the carriage of goods ends, they can not affect the general principle as to when an interstate shipment ceases to be under the protection of the commerce clause of the Constitution, and thereby comes under the control of the state authority."

The fact that notice of the arrival of the goods was given to the consignee in the present case, and that delivery was postponed for a week at his request and for his convenience, does not permit any different conclusion from that reached in Heyman vs. Southern Railway Company. No "constructive

delivery," in advance of the actual delivery was "affirmatively alleged and proven," to use the language of Mr. Justice White in Heyman vs. Southern Railway Company, 203 U. S. 270, 276, or made an issue before the jury, nor does the court of appeals suggest such a state of fact. Its decision is based upon the view that the transaction ceased to be interstate commerce from the time when, by the rules of the common law, the carrier's extraordinary liability had terminated by notice of arrival.

IV.

As applied to interstate traffic, the statute is an unconstitutional regulation of the business, even if it be limited to cases in which the liquor has not been ordered by the consignee.

The legislature of Kentucky can not regulate the business of interstate carriers by forbidding the transportation of whiskey from another state, or by requiring them to ascertain, at their peril, whether goods offered to them for transportation in another state have been contracted for by the consignee, and by imposing a fine if it turns out that the package contains whiskey which was not ordered. A carrier is under no such obligation at common law, and has no means of compelling the shipper to disclose his contractual relations with the consignee. In Western Union Telegraph Company vs. Call Publishing Company, 181 U. S. 92, 102, Mr. Justice Brewer said:

"The principles of the common law are operative upon all interstate commerce transactions except so far as they are modified by Congressional enactment."

In Hall vs. DeCuir, 95 U. S. 485, 490, Chief Justice Waite said:

"By refraining from action, Congress in effect, adopts as

its own regulations those which the common law or the civil law, where that prevails, has provided for the government of such business, and those which the states, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. * * * As was said by Mr. Justice Field, speaking for the court in Welton vs. The State of Missouri, 91 U. S. 282, "inaction [by Congress] * * * is equivalent to a declaration that interstate commerce shall remain free and untrammeled."

In Brenner vs. Titusville, 153 U. S. 289, 302, Mr. Justice Brewer said:

"The silence of congress in respect of any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

In Bowman vs. Chicago & Northwestern Railway Company, 125 U. S. 465 (1888) the court held that a statute of Iowa forbidding common carriers to bring intoxicating liquors into the state from any other state or territory without first being furnished with a certificate prescribed by the law of Iowa, was invalid, because essentially a regulation of commerce among the states. In delivering the opinion Mr. Justice Matthews said:

"It can not be doubted that the law of Iowa now under examination, regarded as a rule for the transportation of merchandise, operates as a regulation of commerce among the states." 125 U. S. 479.

He quoted from the opinion in County of Mobile vs. Kimball, 102 U. S. 691, in which Mr. Justice Field declared that "there can be only one system of rules applicable alike to the whole country" for the regulation of commerce as defined by this court, and "that the authority which can act for the whole country can alone adopt such a system" and that "action upon it by separate states is not therefore permissible."

The doctrine established in Bowman's case is thus stated by Mr. Justice White in Rhodes vs. Iowa, 170 U. S. 412, 415:

"After great consideration it was held that the law of the state of Iowa, in so far as it affected interstate commerce, was repugnant to the interstate commerce clause of the constitution, and was void. It was decided that the transportation of merchandise from one state into and across another was interstate commerce, and was protected from the operation of state laws from the moment of shipment whilst in transit and up to the ending of the journey by the delivery of the goods to the consignee at the place to which they were consigned."

At p. 419 Mr. Justice White said:

"The fundamental right which the decision in the Bowman case held to be protected from the operation of state laws by the Constitution of the United States was the continuity of shipment of goods coming from one state into another from the point of transmission to the point of consignment, and the accomplishment there of the delivery covered by the contract."

In Rhodes vs. Iowa, 170 U. S. 412, the court held that the Wilson Act "was not intended to and did not cause the power of the state to attach to an interstate commerce shipment whilst the merchandise was in transit under such shipment, and until the arrival at the point of destination and delivery there to the consignee." 170 U. S. 426.

The court held "that as the act for which the plaintiff in error [Rhodes] was convicted, and which consisted in moving the goods from the platform to the freight warehouse, was a part of the interstate commerce transportation, and was done before the law of Iowa could constitutionally attach to the goods, the conviction was erroneous, and the judgment below was therefore reversed," 170 U. S. 426.

In Vance vs. W. A. Vandercook Company (No. 1), 170 U. S. 438, 444, Mr. Justice White said:

"Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

In Heyman vs. Southern Railway Company, 203 U. S. 270, the case of Rhodes vs. Iowa was referred to as necessarily involving a decision of the meaning of the word "arrival" in the Wilson Act, and the rule was reiterated that interstate shipments of liquor were protected from state interference until delivery to the consignee. Vance vs. Vandercook was referred to as announcing the same rule.

In American Express Company vs. Iowa, 196 U. S. 133, and Adams Express Company vs. Iowa, 196 U. S. 147, the court held that a statute of Iowa making it an offense for carriers to deliver C. O. D. shipments of intoxicating liquor, was repugnant to the Constitution of the United States, as applied to shipments from another state.

In Central of Georgia Railway Company vs. Murphey, 196 U. S. 194, the court held:

"The imposition, by a state statute, upon the initial or any connecting carrier, of the duty of tracing the freight and informing the shipper, in writing, when, where, how and by which carrier the freight was lost, damaged or destroyed, and of giving the names of the parties and their official positions, if any, by whom the truth of the facts set out in the information can be established, is, when applied to interstate commerce, a violation of the commerce clause of the Federal Constitution; and sections 2317, 2318 of the Code of

Georgia of 1895, imposing such a duty on common carriers is void as to shipments made from points in Georgia to other states."

Mr. Justice Peckham said, at page 204:

"The effect of such a statute is direct and immediate upon interstate commerce. It directly affects the liability of the carrier of freight destined to points outside the state, with regard to the transportation of articles of commerce; it prevents a valid contract of exemption from taking effect, except upon a very onerous condition, and it is not of that class of state legislation which has been held to be rather an aid to than a burden upon such commerce. The statute in question prevents the carrier from availing itself of a valid contract, unless such carrier comply with the provisions of the statute by obtaining information which it has no means of compelling another carrier to give, and yet if the information is not obtained the carrier is to be held liable for the negligence of another carrier over whose conduct it has no control. This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it."

At page 206 he said:

"The power to regulate the relative rights and duties of all persons and corporations within the limits of the state can not extend so far as to thereby regulate interstate commerce. The police power of the state does not give it the right to violate any provision of the Federal Constitution. Being of the opinion that the statute in question when applied to an interstate shipment is a regulation of interstate commerce, we must hold the statute, so far as it affects such shipments, to be void on that account."

In Houston and Texas Central Railroad Company vs. Mayes, 201 U. S. 321, it was held that:

"An absolute requirement that a railroad engaged in interstate commerce shall furnish a certain number of cars on a specified day, to transport merchandise to another

state, regardless of every other consideration except strikes and other public calamities, transcends the police power of the states and amounts to a burden upon interstate commerce; and articles 4497-5000, Rev. Stat. Texas, being such a requirement, are, when applied to interstate commerce shipments, void as a violation of the commerce clause of the Federal Constitution.

Such a regulation can not be sustained as to interstate commerce shipments as an exercise of the police power of the state."

In McNeill vs. Southern Railway Co. 202 U. S. 543, the court held that "the interstate transportation of cars from another state which have not been delivered to the consignee, but remain on the track of the railway company in the condition in which they were originally brought into the state, is not completed and they are still within the protection of the commerce clause of the constitution."

Mr. Justice White in the course of the opinion said (p. 561):

"Viewing the order which is under consideration in this case as an assertion by the corporation commission of its general power to direct carriers engaged in interstate commerce to deliver all cars containing such commerce beyond their right of way and to a private siding, the order manifestly imposed a burden so direct and so onerous as to leave no room for question that it was a regulation of interstate commerce."

In Western Union Telegraph Company vs. Pendleton, 122 U. S. 347, the court held that a statute of Indiana which required telegraph companies to deliver despatches by messengers to the persons to whom the same were addressed if they resided within one mile of the telegraph station, or within the same town, was repugnant to the commerce clause of the Constitution of the United States, as applied to despatches to other states.

In Wabash, St. Louis & Pacific Railway Company vs. Illinois, 118 U. S. 557, the court held that

"A statute of a state intended to regulate or to tax or to impose any other restriction upon the transmission of persons or property or telegraphic messages from one state to another, is not within that class of legislation which the states may enact in the absence of legislation by Congress" (5th Syllabus).

Section 5258 of the Revised Statutes of the United States provides:

"Every railroad company in the United States * * * is hereby authorized to carry upon and over its road * * * all passengers * * * freight and property on their way from any State to another State, and to receive compensation therefor."

A state statute or a rule of state law which compels an interstate carrier to ascertain at his peril whether the shipper has entered into a contract for sale of a liquor shipment with the consignee, imposes on the carrier obligations unknown to the common law and to that extent interferes with commerce.

In State vs. Swett, 87 Me. 113; 32 Atl. 806, a conviction of a carrier for having "short" lobsters in his possession was reversed. The carrier knew that the barrels contained lobsters but did not know that they were "short," and did not inquire. It was held that he had a right to presume that the shipper was not violating the law, and that he was under no duty to investigate packages.

A carrier can not compel a shipper to furnish information as to his contractual relations with the consignee. The rule is thus stated by Hutchinson on Carriers, Sec. 439:

"If the goods or packages are of the character which he usually carries, or which he proposes to carry, the only in-

quiry which he has a right to make is in regard to their value."

This inquiry is permitted to enable the carrier to fix his charges and the amount of the responsibility which he is to assume.

In Crouch vs. London & Northwestern Railway Company, 14 C. B. 255, 291 et seq., Jervis, C. J., said:

"No authority has been cited to show that a carrier is entitled to know the nature of the goods contained in the package which is tendered to him to be carried; and there seems to be no reason why he should be."

In the famous Nitro-glycerine case, 15 Wall. 524, in which it was claimed that express carriers were chargeable with notice of the contents of packages carried by them, Mr. Justice Field in delivering the opinion of the court, said:

"If express carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would in that case be unreasonable to require them to accept as conclusive the information given by the owner. They must be at liberty whenever in doubt to require for their satisfaction an inspection even of the contents of the packages offered as a condition of carrying the packages. This doctrine would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately, the law is not so unreasonable. It does not exact any such knowledge, on the part of the carrier, nor permit him in cases free from suspicion, to require information as to the contents of packages offered as a condition of carrying them." 15 Wall. 539.

V.

If the decision of the court of appeals can be construed as limiting the application of the statute to cases in which the carrier knows that the liquor has not been ordered, the judgments should nevertheless be reversed, because no such issue was submitted to the jury or decided by it, and there was no evidence that plaintiff in error knew that the consignee had not ordered the whiskey.

It is impossible to so limit the decision of the court of appeals in view of the unqualified direction given by the trial court to the jury to find the defendant guilty if it delivered the interstate shipment and received pay for its service. R. 5. Adams Express Company vs. Commonwealth, 96 S. W. 593, decided by the court of appeals October 10, 1906, was tried in Laurel county at the same term as the case at bar, and was in all respects like it, except that the consignee admitted on the stand that he had ordered the whiskey. The trial court gave the jury precisely the same instructions totidem verbis as in the case at bar, and there was a conviction, but the court of appeals reversed the judgment with directions to dismiss the indictment, on the ground that it appeared from the evidence that the whiskey had been ordered by the consignee. The Adams Express Company had no more knowledge however in the one case than in the other as to whether the whiskey had been ordered. The court of appeals in the opinion said (96 S. W. 594):

"The evidence showed that the whiskey in question was shipped C. O. D. from Cincinnati to East Bernstadt, in Laurel county, through the agency of the Adams Express Company. The package contained one gallon of whiskey put up in four quart bottles, and was delivered to the consignee, William Caudell, upon the payment by him of the price of the liquor with the cost of transportation added. The evidence for the

commonwealth conclusively shows that the whiskey was ordered by Caudell in Cincinnati, Ohio, and was shipped to him C. O. D. as before stated. The fact that the goods were ordered in Cincinnati takes this case from without the principle enunciated in Adams Express Company vs. Commonwealth, 92 S. W. 932, 29 Ky. Law Rep. 224, and brings it within the purview of the opinion of the supreme court of the United States in American Express Company vs. Iowa, 196 U. S. 133, and Adams Express Company vs. Iowa, 196 U. S. 147. There, upon facts in all essential particulars similar to those involved here, the supreme court, through Mr. Justice White, held that the shipment of the spirits was interstate commerce, and not subject to the control of prohibition statutes prevailing in Iowa."

In the case of the American Express Company, pending here on writ of error (No. 583) which is to be heard with this case, the trial court instructed the jury as follows (Record in No. 583, pp. 15, 16):

"The court further instructs the jury a delivery of said whiskey in Hodgensville C. O. D. was a sale, unless said whiskey had been ordered by said Graham [the consignee] previously of the consignor M. E. Stone."

The consignor held a written order for the whiskey, purporting to be signed by the consignee, but he disputed the signature at the trial. The court of appeals in its opinion, affirming the judgment of conviction, said (Record in No. 583, p. 29):

"If there was any evidence in this case that the whiskey was not ordered by Graham from the Cincinnati Company; that the pretended order therefor upon which his name appears was a forgery, and that the appellant Express Company knew it was whiskey when received and delivered by it, the verdict should be permitted to stand."

In case No. 332, Rec. p. 12, the Commonwealth stipulated at the trial that the whiskey "was delivered by the defendant, Adams Express Company, and received by it in its office in

Cincinnati, in the usual course of business," and the trial court in its opinion said, and the fact was, that the defendant did not know until the trial that the whiskey had not been ordered by the consignee (Rec. in No. 332, p. 16), but the conviction was nevertheless affirmed by the court of appeals.

The only rule deducible from these various decisions of the court of appeals of Kentucky is that a carrier is liable under the statute unless there was an antecedent contract of sale between the shipper and the consignee, and that the carrier is bound, at its peril, to ascertain the fact. In No. 332, p. 24, the court said:

"Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, *not that it honestly believed*, but that it was the agent of a licensed dealer? In the case at bar the defendant undertakes to show that it was the agent of the consignor, and *that it believed* the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant can not shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor; that is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent."

In the course of the opinion in No. 331 the following are stated as among the undisputed facts established by the evidence (Rec. 29):

"2d. While in the express office, George Meece was informed by appellant's agent in charge that a package containing a gallon of whiskey was then in the office for him,

the charge upon which was $3.85. He then informed appellant's agent that he had not ordered the whiskey, was not expecting it, and had not the money with which to pay the charges thereon, but if satisfactory to the agent, and the latter would hold the whiskey for him until the following Saturday, a week later, he would call at the express office, pay for the whiskey and take it away. To all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent $3.85 for the gallon of whiskey, received and took it away.

3d. The agent knew that the package contained a gallon of whiskey (i. e. four quart bottles), and that it was shipped by Crigler and Crigler of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whiskey."

In this court the question whether the transaction constituted interstate commerce goes both to the merits of the case and the jurisdiction of the court. If that question depends on the fact whether the plaintiff in error knew that the whiskey had not been ordered, this court can not be deprived of jurisdiction, and the plaintiff in error of the protection of the constitution, by a statement in the opinion of the court that such fact was established.

Not only was the learned court of appeals mistaken in stating that the undisputed evidence established that plaintiff in error's agent had been informed by Meece that he had not ordered the whiskey, but as we pointed out in our petition for a re-hearing (Rec. 32, 33), there is no suggestion any where in the evidence that such was the fact. On re-examination of the witness, George Meece (Rec. 11), the following took place:

Question 28. "How did you find out that whiskey was there?

A. The first I knowed it was there, I went with my brother and he asked if there was a package there for him, and while looking over the books Newland said there was

one there for George Meece. I told him I couldn't take it then, but would take it next Saturday, which I did."

Subsequently (Rec. 11) the witness testified that he had not ordered the whiskey, but the record, which includes all the evidence, contains absolutely no suggestion that Meece told the express agent that "he had not ordered the whiskey, was not expecting it," or that the express company, or any of its agents knew that the whiskey had not been ordered. In so far as the decision of the court that the transaction was not interstate commerce is based on the statement that the agent knew that the liquor had not been ordered, it is wholly unjustifiable. The jury did not find such fact, and could not have found it from the evidence.

The charge of the trial judge to the jury decided against the plaintiff in error a question which gives this court jurisdiction, and denied to plaintiff in error the protection of the constitution. Where the state court by improper instructions to the jury, or by withdrawing from their consideration altogether facts involving a federal right, deprives a party of such right, a question of law, reviewable by this court, arises, Keith vs. Clark, 97 U. S. 454, 456; Rector vs. City Deposit Bank, 200 U. S. 405, 412, and it is immaterial whether the Court of Appeals in affirming the judgment, relied more on the unconstitutional legislation, or the existence of a fact not found by the jury, and of which there was no evidence. Terre Haute & Indianapolis Railroad Company vs. Indiana, 194 U. S. 579.

Similar considerations govern case No. 332. There was no suggestion anywhere in the evidence that the express company, or any of its agents knew that Main, the consignee of the shipment in question, had not ordered it. He testified (Rec. 9) that he had not ordered any liquor shipped to him, but that he had inquired at the express office for

liquor consigned to him, and had authorized a local drayman to carry it from the express office to his residence. (Rec. 9, 11.)

The lower court found that there was no evidence that the express company knew that the liquor had not been ordered by Main, but held that that fact was immaterial and that the interstate carrier was bound to know the relations between the shipper and the consignee. No. 332, R. 16.

CONCLUSION.

The trial court held, on what we think was a proper construction of the statute under which the indictments were drawn, that it was immaterial whether the whiskey had been ordered by the consignee, or whether plaintiff in error knew that it had not been ordered.

The statute makes no exception of cases in which the liquor has been contracted for by the consignee, and in cases in which it has not been contracted for does not permit the carrier to rely on his ignorance of that fact as a defense. The highest court of the state has expressly approved of this construction of the statute, stating that a carrier is guilty of an offense in delivering a C. O. D. shipment of liquor "even if it believes the acts of the consignor a legitimate act of interstate commerce." This was the construction of the act necessarily adopted in these cases.

We respectfully submit that such a statute is repugnant to the constitution of the United States, and that the judgments should be reversed.

In Ellington vs. State (Tex. Crim. App.) 86 S. W. 330, a judgment of conviction for selling liquor against an express agent who had delivered an interstate shipment to the consignee and collected the C. O. D. charges, was reversed, the court saying at p. 331:

"Appellant was not aware of the fact that the shipment was not in pursuance of a contract. The presumption in such cases is that the transaction was legitimate, and the shipment was not violative of the law. All presumptions are in favor of innocence, and this presumption is matured into a fact by the testimony here presented. He was acting as the agent of the Wells-Fargo Express Company, which company, as common carrier, brought the goods from Shreveport, in Louisiana, to Timpson, in Texas. There are some fundamental principles underlying our criminal law necessary to be kept in view when trying men charged with offenses: first, that all parties are presumed to be innocent; second, the reasonable doubt obtains in their favor; third, if there is such doubt on the testimony, the accused is entitled to an acquittal; fourth, if there is a mistake of fact, the party is entitled to an acquittal. It therefore follows that, in order to hold appellant guilty, he must have known that this was an illegal shipment; that there was no contract behind the parties authorizing the shipment; and that he turned over the goods to Rutherford with the knowledge of these facts. The statement of facts excludes this condition of case. That the shipping party at Shreveport, La., was the owner of the goods, and sent them through the express company, and tendered them to Rutherford at Timpson, would not make appellant guilty of a sale in delivering the goods, unless he knew those facts. It may be conceded that the shipper was the owner of the goods when received at Timpson, and they were there tendered to Rutherford by the shipper, through the express company; that they were his goods at Timpson, and not Rutherford's, until Rutherford had accepted; and if appellant had known these facts when he delivered the goods he might be held criminally responsible, but in the absence of such knowledge he would not be guilty."

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